



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 29 (E041) OF 2021

WELDON KIPKORIR ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **Weldon Kipkorir Rotich** was charged with the offence of being in **unauthorized possession** of **Examination paper, materials or information** contrary to **Section 27(1)** of the **Kenya National Examination Council Act**. The particulars of the offence are that on **16th April 2021** at **St. Teresa's Bikeke Girls Secondary School in Trans Nzoia County**, without lawful excuse, had in his possession Kenya Certificate of Secondary Education 2020 Physics Practical Paper No. 232/2 Serial number A182910119. In the second count, he was charged with the offence of **engaging in examination malpractices** contrary to **Section 28(b)** of the **Kenya National Examination Council Act**. The particulars of the offence were that on the same day and in the same palace, the Appellant without lawful authority disclosed the contents of an examination paper for Kenya Certificate of Secondary Education 2020 Physics Practical Paper No. 232/3 Serial Number A 182185 910119 through his whatsapp page. When the Appellant was arraigned before the trial Magistrate's Court, he pleaded guilty to the charges. The Appellant was convicted on his own Plea of Guilty. He was sentenced to serve two (2) years imprisonment on each count. The Sentences were ordered to run consecutively.

Aggrieved by his conviction and sentence, the Applicant has filed an appeal to this court. He contends that the plea of guilty that was recorded by the trial Magistrate was equivocal. He should not therefore have been convicted on the basis of such plea. He stated that the charges upon which he was called to answer to were defective and could not form basis for the charges that were read to him. He was aggrieved that the facts narrated to the court by the Prosecution did not support the charges. He complained that the Custodial Sentence that was imposed on him was irregular and excessive. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside his sentence. He pleaded with the court to remit back the case to the trial Magistrate's court so he can take plea afresh.

During the hearing of the Appeal, this court heard oral rival submission by Ms Arunga for the Appellant and by Mr Nderitu for the State. Ms Arunga submitted that the plea of guilty that was recorded by the trial Magistrate was equivocal; the charge was not explained to the appellant to enable him understand the essential ingredients of the charge. The facts were not explained to the Appellant. She pointed out that the words

“... without lawful exercise” as contained in **Section 27** of the **Kenya National Examination Council Act** was not explained. As regards, the second count, the particulars in support of the charge was not read to him to confirm if indeed the facts were correct or not. Learned Counsel was of the view the Appellant's right to fair trial was compromised. On Sentence, Ms Arunga submitted that the Appellant was sentenced to serve a custodial sentence without being given on option of a fine. She was of the view that the trial Magistrate did not observe the directions given by the court in Adan – Vs – Republic [1973] EA 445. In the premises therefore, she urged the court to allow the appeal in its entirety.

Mr Nderitu for the State opposed the appeal. He submitted that the Plea of guilty that was recorded by the trial magistrate was unequivocal. The charges were read to the Appellant. The facts in support of charges were read to the Appellant. He properly admitted to the charges having understood them. There was no basis upon which the court could upset the convict. On sentence, learned Prosecutor submitted that the offences the Appellant committed were serious and deserved the custodial sentence that was imposed. In the premises therefore, he urged the court to disallow the appeal.

As the first appellate court, this court is required to reconsider and re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any remarks regarding the demeanor of the witnesses (See Njoroge – Vs – Republic [1987] KLR 19).

In the present appeal, the issue for determination is whether the plea of guilty that was recorded was unequivocal. The procedure that the court is required to observe when recording a plea from an accused person is provided under **Section 207** of the **Criminal procedure Code**. It provides thus:

“ (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement,

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary; Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

The leading case setting out what the court recording a plea of guilty should consider is **Adan –Vs- Republic [1973] EA 445**. In that case, the Court of Appeal pointed out, *inter alia*, for a plea of guilty to be unequivocal the charge should be read to the accused in a language that he understands; every element constituting the charge must be explained to the accused. He should be asked to confirm that each element of the charge is correct; the trial court should record, as much as possible the words used by the accused in admitting to the offence so that there is no doubt that he is admitting to the charge and the facts thereof. If the facts stated by the prosecution do not support all the elements of the charge, the court has no option but to enter a plea of not guilty.

In the present appeal, after the Appellant was asked upon to answer to the charges, he pleaded guilty to both counts. The prosecutor then stated to the court the following as constituting the facts that support the charge:

“On the 16th April 2021 at St Teresa’s Bikeke Kiminini the accused was found in possession of a KCSE 2020 Paper No. 232/2 Serial No. 182/155/910/119. During the said period he shared the same through his Whats-App group. Investigations commenced. He was arrested. I have Exhibit No. 1.”

The Appellant is said to have responded

“ facts are correct”.

The issue before this court is whether the above facts support the two charges that were brought against the appellant. It should be noted that being in possession of an examination paper from Kenya National Examination Council is not, *per se*, unlawful. Indeed all schools use past examination papers in the course of revising and preparing candidates for examination. What the **Kenya National Examination Council Act** declares unlawful is for an individual to have access to an examination paper before the same has been administered or offered to test the candidates of those registered to undertake an examination in respect of the particular paper. It is also unlawful for any person to transmit the paper before it has been examined by any means of communication including Whats-APP. That being the case, the facts provided by the Prosecution to the court were wholly inadequate and unsatisfactory to establish the charges that were brought against the Appellant. The elements of the charge explained above were not put to the Appellant to answer to. The Appellant could not therefore be expected to admit to facts which, *prima facie*, did not establish any offence known in law. This court agrees with the Appellant’s Counsel that the plea of guilty that was recorded by the trial court was equivocal – the facts did not support the charges brought against the Appellant.

In the premises therefore, the appeal filed by the Appellant has merit. It is hereby allowed. The conviction is hereby quashed. The custodial sentence imposed on the Appellant is set aside. The Appellant shall be presented before the Chief Magistrate on 7th July 2021 at 9.00 am where he shall take plea afresh on the charges herein in a retrial that is hereby ordered by this court. The Appellant shall be at liberty to make an appropriate application for bail (if he pleads not guilty) after the plea is taken. It is so ordered.

DATED at KITALE this 6th day of July, 2021.

L. KIMARU

JUDGE